UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIMOTHY M. COHANE, PLAINTIFF-APPELLANT,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, BY AND THROUGH ITS PRESIDENT, MYLES BRAND, TOM HOSTY, AS AN NCAA ENFORCEMENT DIRECTOR AND AS AN EMPLOYEE OF THE NCAA, STEPHANIE HANNA, AS AN NCAA ENFORCEMENT DIRECTOR AND AS AN EMPLOYEE OF THE NCAA, JACK FRIEDENTHAL, AS AN EMPLOYEE OF THE NCAA AND FORMER CHAIRMAN OF THE NCAA COMMITTEE ON INFRANCTIONS, DEFENDANTS-APPELLEES.

No. 05-5860-cv

Jan. 25, 2007

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215 Fed. Appx. 13

Appeal from a final decision of the United States District Court for the Western District of New York (William M. Skretny, Judge).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is hereby **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for proceedings consistent with this order.

PRESENT: Hon. CHESTER J. STRAUB, Hon. RICHARD C. WESLEY, Circuit Judges, Hon. STEFAN R. UNDERHILL,* District Judge.

SUMMARY ORDER

Plaintiff-Appellant Timothy M. Cohane appeals from a final order entered in the United States District Court for the Western District of New York (William M. Skretny, *Judge*), granting the motion to dismiss of Defendant-Appellee National Collegiate Athletic Association ("NCAA") and its employees involved in the NCAA's investigation of the State University of New York at Buffalo (the "University")—Defendants-Appellees Myles Brand, Stephanie Hanna, and Jack Friedenthal. The relevant facts and allegations of the complaint are fully set forth in the District Court opinion, with which we presume familiarity. *See Cohane v. NCAA*, No. 04-cv-181S, 2005 WL 2373474 (W.D.N.Y. Sept. 27, 2005).

We review the District Court's grant of the NCAA's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) *de novo*, accepting all the material allegations of the complaint as true and affirming the dismissal only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir.2002) (internal quotation marks omitted). "This rule applies with particular force where the plaintiff alleges civil rights violations...." *Id.* (internal quotation marks omitted). "The appropriate inquiry is not whether a plaintiff is likely to prevail, but whether he is entitled to offer evidence to support his claims." *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir.2005).

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* Honorable Stefan R. Underhill of the United States District Court for the District of Connecticut, sitting by designation.

Statute of Limitations

On appeal, Cohane has abandoned his claims that his forced resignation on December 3, 1999, deprived him of his *property* interest in his position as the head coach of the men's basketball team at SUNY Buffalo. Instead, he argues that the NCAA's March 21, 2001 report of its investigation (the "Report") and the University's ratification of the Report's findings, defamed him and destroyed his ability to pursue his chosen occupation. Count I alleges damages arising from the imposition of the sanctions by the NCAA in the Report is, therefore, timely. All claims for injuries occurring prior to March 19, 2001, however, are time barred. Given Cohane's specification of the Report as the instrument that caused the deprivation of his liberty interest, we reject the claim that Cohane has "has experienced a continuous practice and policy of discrimination," sufficient to toll "the commencement of the statute of limitations period ... until the last discriminatory act in furtherance of it." *Fitzgerald v. Henderson*, 251 F.3d 345, 359 (2d Cir.2001) (internal quotation marks and citations omitted), *cert. denied*, 536 U.S. 922, 122 S.Ct. 2586, 153 L.Ed.2d 776 (2002).

Further, for substantially the reasons stated by the District Court, Count II of the complaint for tortious interference with Cohane's contractual relationship with the University is time barred. *See Cohane*, 2005 WL 2373474, at *7-8.

State Action

We hold that the District Court erred in concluding that Cohane could prove no set of facts showing that the NCAA was a "willful participant in joint activity with the State," *see Brentwood Academy v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (internal quotation marks omitted), to deprive him of his liberty, to pursue his chosen occupation, without due process of law, *see Donato v. Plainview-Old Bethpage Cent.*

Sch. Dist., 96 F.3d 623, 630 (2d Cir.1996) (internal quotation marks omitted), *cert. denied*, 519 U.S. 1150, 117 S.Ct. 1083, 137 L.Ed.2d 218 (1997). Specifically, the District Court, relying on the Supreme Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988), held that the complaint failed to plead sufficiently the NCAA's "joint activity" with the University. The plaintiff in *Tarkanian* asserted that The University of Nevada at Las Vegas's ("UNLV") cooperation with the NCAA's investigation made the latter an agent of the State. 488 U.S. at 196, 109 S.Ct. 454. The Supreme Court rejected this claim because "the notion that UNLV's promise to cooperate in the NCAA enforcement proceedings was tantamount to a partnership agreement or the transfer of certain university powers to the NCAA is *belied by the history of this case.*" *Id.* (emphasis added). In *Tarkanian*, the Supreme Court noted that during the NCAA's investigation, UNLV "denied all of the allegations" and maintained "that Tarkanian was completely innocent of wrongdoing." *Id.* at 185, 109 S.Ct. 454. The Court concluded that "the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth." *Id.* at 196, 109 S.Ct. 454.

The facts relied on by the Supreme Court in *Tarkanian* were found by a Nevada state court following a two-week bench trial. *See id.* at 188, 109 S.Ct. 454. In contrast, the District Court, in this case, was required to accept all of the allegations in Cohane's complaint as true, including those describing a pattern of collusion between the University and the NCAA. In particular, the complaint alleges that the University forced Cohane's resignation immediately upon learning of the charges in an attempt to placate the NCAA (Compl. ¶¶ 27-30), actively participated in the case against Cohane in the hearings held by the Mid-American Conference and the NCAA (*id.* ¶¶ 31-33, 37), intimidated student-witnesses into giving false statements to NCAA

investigators by threatening to wrongfully withhold their degrees (*id.* ¶¶ 35-36), suborned perjury at the NCAA hearing (*id.* ¶ 37), and adopted the Report and its findings thereby placing its *imprimatur* upon the defamatory statements and penalties imposed on Cohane (*id.* ¶¶ 38, 41). The allegations that the University abused its authority to confer or withhold degrees, but also that this abuse of power improperly pressured students into providing false testimony (Compl. ¶¶ 35-36), distinguish this case from *Tarkanian*, where "there [was] no suggestion of any impropriety respecting the agreement between the NCAA and UNLV." 488 U.S. at 197 n. 17, 109 S.Ct. 454. Further in *Tarkanian*, "[t]he NCAA enjoyed no governmental powers to facilitate its investigation," including the power to subpoena witnesses. *Id.* at 197, 109 S.Ct. 454. Cohane specifically alleges that the University used its authority to compel witnesses to testify against him just as if they had been compelled by subpoena.

These non-conclusory allegations combined with the others in the complaint, if proven, could show that the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty. Cohane could show that without the State's assistance and the exercise of its coercive authority upon the student witnesses, the NCAA could not have issued the defamatory report and imposed sanctions on Cohane. Certainly, the NCAA may be able to rebut these claims and show that it did not engage in concerted action with the University, but at this point in the litigation, it was error for the District Court to interpret *Tarkanian* as holding categorically that the NCAA can never be a state actor when it conducts an investigation of a state school.

For the foregoing reasons, the judgment of the District Court is hereby **AFFIRMED** in part, and **REVERSED** in part. This case is remanded for further proceedings consistent with this order.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

TIMOTHY M. COHANE, PLAINTIFFS,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, TOM HOSTY, STEPHANIE HANNA, AND JACK FRIEDENTHAL, DEFENDANTS

No. 04-CV-181S

Sept. 27, 2005.

2005 WL 2373474

SKRETNY, J.

DECISION & ORDER

I. INTRODUCTION

In this case, Plaintiff Timothy Cohane, a former basketball coach, alleges that Defendants deprived him of his liberty interest in his reputation without due process of law in violation of 42 U.S.C. § 1983. In addition, Plaintiff alleges that Defendants tortiously interfered with his contractual relationship with the State University of New York at Buffalo ("SUNY Buffalo"). Currently before this Court is Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. BACKGROUND

A. Facts

The following facts, which are alleged in the Complaint, are assumed true for purposes of the instant motion. Plaintiff served as head coach of the men's intercollegiate National Collegiate Athletic Association ("NCAA") Division I basketball team at SUNY Buffalo from 1993 through December 3, 1999. (*Compl.*, ¶ 5). The NCAA, an unincorporated association, is charged with marketing, governing, controlling and operating the multi-billion dollar college sports industry, including all aspects of intercollegiate sports and athletics departments operating at SUNY Buffalo. (*Compl.*, ¶¶ 6 & 8). Plaintiff alleges that Tom Hosty and Stephanie Hanna acted as directors of the NCAA enforcement staff, and that Jack Friedenthal acted as Chairman of the NCAA's Committee on Infractions during the time relevant to this action. (*Compl.*, ¶¶ 10, 11).

After SUNY Buffalo hired Plaintiff as the head coach of its men's basketball team in 1993, the team progressed from an NCAA team without a league to the East Coast Conference, and finally to the Mid American Conference. (*Compl.*, ¶ 25). On January 29, 1999, SUNY Buffalo approved Plaintiff's contract extension through April 13, 2002. (*Compl.*, ¶ 26). On August 9, 1999, Rob Fournier ("Fournier"), a Mid American Conference employee, authored and signed a letter to the NCAA, wherein he confirmed his prior phone call to the NCAA on August 3, 1999, regarding an alleged infraction, and referred to documentation that SUNY Buffalo had provided. (*Compl.*, ¶ 27). Specifically, the letter stated as follows:

> "As a consequence of the sensitive personal and private issues to be protected, the Conference will undertake this process in the coming weeks by submitting affidavits, interviewing affected parties, and insuring due process.... Toward that end, we will utilize when necessary the full

> services and cooperation of personnel at the University at Buffalo including New York State legal counsel."

(*Compl.*, ¶ 27).

On December 3, 1999, Plaintiff attended a meeting during which SUNY Buffalo's counsel advised him that according to the NCAA, it was assumed that he was guilty of major NCAA rule violations, and that he and his staff should be forced to resign. (*Compl.*, ¶ 28). Plaintiff was forced to resign that day pursuant to a written contract that included a release for any actions committed by Plaintiff on or before October 3, 1999. (*Compl.*, ¶¶ 28, 64). On December 22, 1999, Fournier advised SUNY Buffalo on behalf of MAC and NCAA that although Cohane's departure was characterized as a resignation, "it has the effect of a change of leadership." (*Compl.*, ¶ 30).

Between January 16, and 18, 2000, the MAC Committee on Infractions held a hearing at which representatives of the MAC schools judged the MAC investigation and report issued by Fournier. (*Compl.*, ¶ 31). SUNY Buffalo officials and representatives of the NCAA participated in the case against Plaintiff. (*Compl.*, ¶ 31). According to a December 7, 1999 notification, the MAC adopted the procedures of Article 32 of the NCAA by-laws, which govern such investigations, including issues related to conflicts of interest, information gathering, verification and access to records, and disclosure of information. (*Compl.*, ¶ 29, 34).

In the Spring of 2000, after the completion of the basketball season and after some of the student athletes had exhausted their NCAA eligibility, the NCAA enforcement staff requested interviews with the student athletes to discuss Plaintiff. (*Compl.*, ¶ 35). When the student athletes refused to interview, SUNY officials threatened that if they did not comply with the NCAA's request, the issuance of their degrees would be at risk. (*Compl.*, ¶ 35).

On January 29, 2001, Defendants Hosty and Hanna issued a case summary to be used by the NCAA Committee on Infractions during a hearing scheduled for February 9, 2001. (*Compl.*, ¶ 36). In preparing the case study, Defendants used and relied upon information provided by SUNY officials, including affidavits which Defendants allegedly knew contained coerced, falsified or otherwise tainted information. (*Compl.*, ¶ 36). At the February 9, 2001 hearing, Defendants acted in conjunction with SUNY officials to introduce this tainted and false evidence against Plaintiff. (*Compl.*, ¶ 37).

In a written press and internet report dated March 21, 2001 ("Infractions Report"), the NCAA and Chairman Friedenthal found that Plaintiff had acted "evasive, deceptive and not credible" and "contrary to the principles of ethical conduct." (*Compl.*, ¶ 38). Specifically, the NCAA found Plaintiff guilty of "major violations" for conduct that it has uniformally ruled to constitute "minor violations" in over 300 cases before and since. (*Compl.*, ¶ 39). Based on these findings, the NCAA sanctioned Plaintiff by prohibiting him from coaching at any NCAA school. (*Compl.*, ¶ 38). Immediately following the release of the NCAA report, the NCAA and SUNY held a joint press conference, at which school officials declared that "[SUNY] accepts the report and its findings in its entirety." (*Compl.*, ¶ 41). Plaintiff requested but was denied participation in the joint press conference. (*Compl.*, ¶ 41).

On August 20, 2001, the NCAA Appeals Committee ("Appeals Committee") reviewed the findings of the March 21, 2001 report, and on October 12, 2001, reprimanded the Committee on Infractions, stating that "many aspects of the case were troublesome." (*Compl.*, ¶¶ 43, 44). Specifically, the Appeals Committee reprimanded the Committee on Infractions for not interviewing key witnesses, conducting an inconsistent investigation, and employing troublesome language and rationale regarding its findings of unethical

conduct. (*Compl.*, ¶ 44). Specifically, the Appeals Committee cautioned that "a person['s] assertion of innocence[,] however vigorous[,] against charges of a violation should not ordinarily be the subject of an unethical conduct finding." (*Compl.*, ¶ 44).

While admitting in writing on October 12, 2001, that a finding of ethical conduct constitutes a "stain on the reputation and career" of the violator, the NCAA failed to remove Plaintiff's ethical violation from its records, including its website. (*Compl.*, ¶¶ 42, 45, 46). In addition, the ethical charges remain part of Plaintiff's permanent personnel file maintained by SUNY Buffalo. (*Compl.*, ¶ 42). As such, the NCAA's stigmatizing report continues to be disclosed to all of Plaintiff's prospective employers. (*Compl.*, ¶ 42).

B. Procedural Background

Plaintiff commenced this case by filing a Complaint in the United States District Court for the Western District of New York on March 19, 2004. On October 4, 2004, Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1] On March 4, 2005, this case was reassigned from Senior United States District Judge John T. Curtin to the undersigned.

In support of their motion, Defendants filed a Memorandum of Law and a Reply Memorandum of Law. Plaintiff filed a Memorandum of Law, an Affidavit, and a Sur-reply Memorandum of Law in opposition to the Motion.

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[1] According to the official docket in this case, Defendants erroneously filed a Memorandum of Law as a Motion to Dismiss on October 1, 2004. Defendants filed a proper Motion to Dismiss, along with the previously filed Memorandum of Law on October 4, 2004. As such, there is only one dispositive motion pending before this Court. The Clerk of the Court is directed to terminate the erroneously identified Motion to Dismiss (Docket No. 14), as it is duplicative of a document attached to the properly filed Motion (Docket No. 15).

III. DISCUSSION

A. Motion to Dismiss Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When resolving a motion to dismiss under Rule 12(b)(6), a court must accept the factual allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-moving party. *Still v. DeBuono*, 101 F.3d 888, 891 (2d Cir.1996); *see also Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir.2000) (noting that factual allegations in the complaint must be accepted as true on a motion to dismiss). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir.1994) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

In order to survive a motion to dismiss, a plaintiff must assert a cognizable claim and allege facts that, if true, would support such a claim. *See Boddie v. Schnieder*, 105 F.3d 857, 860 (2d Cir.1997). At the same time, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to survive a motion to dismiss." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir.2002) (internal citations omitted). Ultimately, in the context of such a motion, "[t]he issue is not whether a plaintiff will or might ultimately prevail on her claim, but whether she is entitled to offer evidence in support of the allegations in the complaint." *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 62 (2d Cir.1997) (citation omitted).

B. Defendants' Motion to Dismiss

Plaintiff asserts two causes of action against Defendants. In the first cause of action, brought pursuant to 42 U.S.C. § 1983, Plaintiff alleges that Defendants violated his

constitutional right to due process. In Plaintiff's second cause of action, he claims that Defendants tortiously interfered with his contractual relationship with SUNY.

Defendants argue that both causes of action should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Specifically, Defendants contend that they are not state actors subject to liability under 42 U.S.C. § 1983. Second, Defendants argue that both of Plaintiff's claims are barred by the applicable statute of limitations. Finally, Defendants propose that should this Court find that Plaintiff's common law tortious interference claim is timely, it should nonetheless decline to exercise supplemental jurisdiction over this state law claim. This Court will address each cause of action in turn.

1. 42 U.S.C. § 1983: State Action Requirement

Civil liability is imposed under 42 U.S.C. § 1983 only upon persons who, acting under color of state law, deprive an individual of rights, privileges, or immunities secured by the Constitution and laws. *See* 42 U.S.C. § 1983; *Wimmer v. Suffolk County Police Dep't*, 176 F.3d 125, 137 (2d Cir.1999). On its own, Section 1983 does not provide a source of substantive rights, but rather, provides a method for vindicating federal rights conferred elsewhere in the federal statutes and the Constitution. *See Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 145 n. 3, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979)). Accordingly, in reviewing claims brought pursuant to Section 1983, it is necessary to precisely identify the constitutional violations alleged. *See Baker*, 443 U.S. at 140. Here, Plaintiff's claim is that Defendants violated his Fourteenth Amendment right to due process.

The Fourteenth Amendment provides, in pertinent part, that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law...." U.S. CONST.

amend. XIV. There are two broad categories of due process claims—substantive and procedural. A substantive due process claim is based upon the deprivation of a constitutionally protected life, liberty, or property interest. *See B.D. v. DeBuono*, 130 F.Supp.2d 401, 431 (S.D.N.Y.2000). A procedural due process violation occurs when the Government deprives a person of a protected life, liberty, or property interest without first providing that person with notice and an opportunity to be heard. *Id.* at 432-33.

The fundamental purpose of Section 1983 is "to provide compensatory relief to those deprived of their federal rights by state actors." *Kia P. v. McIntyre*, 235 F.3d 749, 755 (2d Cir.2000) (quoting Felder v. Casey, 487 U.S. 131, 141, 108 S.Ct. 2302, 2308, 101 L.Ed.2d 123 (1988)). Accordingly, a court assessing the viability of a Section 1983 claim must first determine whether the actions alleged were committed under color of state law. *Carlos v. Santos*, 123 F.3d 61, 65 (2d Cir.1997). "The traditional definition of acting under color of state law requires that the defendant in a [Section] 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Kern v. City of Rochester*, 93 F.3d 38, 43 (2d Cir.1996) (quoting *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988)).

With respect to the Fourteenth Amendment, there exists a clear dichotomy between state action, which is subject to scrutiny under the due process clause, and "private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *NCAA v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 461, 102 L.Ed.2d 469 (1988) (citing *Shelly v. Kramer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 11961 (1948); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 452, 42 L.Ed.2d 447 (1974)). As a general matter, the protections provided

by the Fourteenth Amendment do not extend to private conduct which abridges constitutional rights. *Tarkanian*, 488 U.S. at 191 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961)). Accordingly, for the purposes of this Court's analysis, the "under-color-of-law requirement of 42 U.S.C. § 1983 and the state-action requirement of the Fourteenth Amendment are equivalent." *Tarkanian*, 488 U.S. at 182 n. 4 (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 928-935, 102 S.Ct. 2744, 2749-2752, 73 L.Ed.2d 482 (1982)).

It is only under rare circumstances that a private entity may be considered a "state actor" for purposes of Section 1983. *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir.1992). Private action is considered "state action" if and only if, there is such a "close nexus between the State and the challenged action that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S.Ct. 924, 930, 148 L.Ed.2d 807 (2001) (quoting *Jackson*, 419 U.S. at 351). "From the range of circumstances that could point toward the State behind an individual face," however, "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Brentwood Acad.*, 531 U.S. at 295-96.

Numerous Supreme Court cases have identified the "host of facts that can bear on the fairness of such an attribution." *Brentwood Acad.*, 531 U.S. at 296. For example, when the challenged activity results from the State's exercise of "coercive power," *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982), or when a nominally private entity is "entwined with governmental policies," or when government is "entwined in [its] management or control," *Evans v. Newton*, 382 U.S.

296, 299, 301, 86 S.Ct. 486, 489, 15 L.Ed.2d 373 (1966), state action may be found.

In this context, the Supreme Court has explicitly held that the NCAA is not a state actor within the meaning of Section 1983. *Tarkanian*, 488 U.S. at 199. *Tarkanian* arose when the NCAA's Committee on Infractions investigated the allegedly improper recruiting practices of the University of Nevada, Las Vegas ("UNLV"), and discovered several violations committed by Jerry Tarkanian, UNLV's enormously successful basketball coach. *Tarkanian*, 488 U.S. at 179. Following the investigation, the Committee imposed numerous sanctions upon UNLV, and "requested it to show cause why the additional penalties should not be imposed if it failed to suspend Tarkanian during [the] probationary period." *Tarkanian*, 488 U.S. at 179. Faced with a potential demotion and drastic pay cut, Tarkanian brought suit against the NCAA alleging that it had deprived him of his due process rights in violation of 42 U.S.C. § 1983. *Tarkanian*, 488 U.S. at 179.

The Supreme Court held that "the NCAA's participation in the events that led to Tarkanian's suspension did not constitute 'state action' prohibited by the Fourteenth Amendment and was not performed 'under color of' state law within the meaning of [Section] 1983." *Tarkanian*, 488 U.S. at 179. Further, the Court held that the NCAA could not be "deemed to be a state actor on the theory that it misused power it possessed by virtue of state law, since UNLV's decision to suspend Tarkanian, while in compliance with the NCAA's rules and recommendations, did not turn the NCAA's conduct into action under color of [State] law." *Tarkanian*, 488 U.S. at 179. The Court opined that "it would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of [State] law." *Tarkanian*, 488 U.S. at 199.

In holding the NCAA's investigation, enforcement proceedings, and consequent recommendations did not constitute state action, the Court reasoned that "UNLV delegated no power to the NCAA to take specific action against any University employee; UNLV and the NCAA acted as adversaries throughout the proceedings; the NCAA enjoyed no governmental powers to facilitate its investigation; and the NCAA did not—indeed, could not—directly discipline Tarkanian, but could only threaten additional sanctions against UNLV if the University chose not to suspend its coach." *Tarkanian*, 488 U.S. at 180. Furthermore, the Court reasoned, even assuming that "the power of the NCAA [was] so great that [the University] had no practical alternative but to comply with the Association's demands, it did not follow that the NCAA was therefore acting under color of state law." *Tarkanian*, 488 U.S. at 180.

Tarkanian compels the same conclusion in the instant case. That is, this Court finds that the NCAA, including its employees, did not engage in state action by investigating Plaintiff regarding his alleged infractions, however unfairly, by publishing a report concluding that he was guilty of such infractions, or by recommending that SUNY force him to resign. This Court is not persuaded by Plaintiff's argument that SUNY's cooperation, complicity, or conspiracy with the NCAA transformed its otherwise private conduct into state action.[2] As the Supreme Court articulated in Tarkanian,

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[2] In support of his argument, Plaintiff cites to *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). Unlike the case at bar, *Brentwood* involved an athletic association that regulated interscholastic sports among the private and public schools *in a single state*, Tennessee. The Court found under the circumstances in *Brentwood* that the athletic association's nominally private character was "overborne by the pervasive entwinement of public institutions and public officials in its composition and workings," leading to a conclusion of state action. *Brentwood*, 531 U.S. 289. The *Brentwood* Court took pains to distinguish *Tarkanian*, stating that in the previous case "the NCAA's policies were shaped not by

"[j]ust as a state-compensated public defender acts in a private capacity when he or she represents a private client in a conflict with the State ... the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university." 488 U.S. at 196 (internal citations omitted); *see also McRae v. Sweet*, No. 91-CV-1403, 1991 WL 274261, at *4 (N.D.N.Y. Dec.17, 1991) ("[T]he independent nature of the NCAA was finally decided by the Supreme Court in 1988, in Tarkanian."). Consistent with this characterization, this Court finds that the NCAA conducted its investigation of SUNY Buffalo, a public university, and its coach, in the interests of the entire NCAA membership. *See Tarkanian*, 488 U.S. at 193.

Under the circumstances, it cannot be said that SUNY Buffalo's alleged complicity in this investigation somehow transforms the NCAA's well-establish private conduct into state action for purposes of Section 1983. Assuming the

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the University of Nevada alone, but by several hundred member institutions, most of them having no connection to Nevada, and exhibiting no color of Nevada law." *Brentwood*, 531 U.S. 289. Unlike the athletic association in *Brentwood*, the NCAA promulgates and enforces its rules and otherwise acts on behalf of its collective nationwide membership, "speaking through an organization that is independent of any particular state." *Tarkanian*, 488 U.S. at 193. Accordingly, the NCAA cannot be characterized as a nominally private actor that is so pervasively intertwined with any state such that it is subject to liability under 42 U.S.C. § 1983.

Plaintiff also cites to *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), for the proposition that where state and private actors engage in joint activity, as SUNY Buffalo and the NCAA did here, the private actor's conduct may be construed as state action. However, *Lugar* is "explicitly limited to the particular context of prejudgment attachment." *Wilson v. Pfieffer*, 565 F.Supp. 115, 118 (S.D.N.Y.1983). Nor do the other cases cited by Plaintiff, *Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308 (2d Cir.2003) and *Lloyd v. Botanical Gardens*, No. 03 7557, 2004 WL 2093468, at *5 (S.D.N.Y. Sept.17, 2004), compel the conclusion that the NCAA's conduct constituted state action here.

truth of Plaintiff's allegations, as it must, this Court finds that the NCAA's actions cannot reasonably be attributable to New York State such that liability may be imposed upon it under 42 U.S.C. § 1983. Accordingly, Plaintiff's due process claim brought pursuant to Section 1983 will be dismissed.

2. State Claim for Tortious Interference with Contractual Relations: Statute of Limitations

To prevail on a claim for tortious interference with a contract, a plaintiff must establish: (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff. *Finley v. Giacobbe*, 79 F.3d 1285, 1294 (2d Cir.1996) (citing *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956)). Under New York law, such claims are governed by the three year statute of limitations applicable to injury to property. *See* N.Y. C.P.L.R. § 214(4); *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 92, 595 N.Y.S.2d 931, 612 N.E.2d 289 (1993). The statute of limitations on a tortious interference claim accrues "when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint." *Kronos*, 81 N.Y.2d at 94, 595 N.Y.S.2d 931, 612 N.E.2d 289.

In the instant case, Plaintiff alleges that two contracts existed between himself and SUNY Buffalo: his employment contract, which SUNY extended until April 13, 2002; and the contract executed on the day of his resignation, December 3, 1999, which contained a release for any of Plaintiff's actions that occurred prior to that date. (*Compl.*, ¶¶ 59, 64). Plaintiff claims that the NCAA had actual knowledge of both of these contracts. (*Compl.*, ¶¶ 62, 65). Nonetheless, Plaintiff alleges, the NCAA induced

SUNY to breach its employment contract with him by forcing his resignation on December 3, 1999. (*Compl.*, ¶ 63). Further, he contends that the NCAA caused SUNY to breach its contract of release by engaging the University in a "continuous pattern of wrongful, improper or egregious conduct" against Plaintiff, which took place between December 4, 1999, and March 21, 2001. (*Compl.*, ¶¶ 66, 67). As previously noted herein, Plaintiff filed his Complaint on March 19, 2004.

Based on the foregoing, this Court finds that Plaintiff's tortious interference claim is barred by the applicable statute of limitations. With respect to Plaintiff's employment contract, any tortious interference claim based on breach of contract clearly accrued on December 3, 1999, the date he was forced to retire, and expired three years later, on December 4, 2003, several months before he filed his Complaint on March 19, 2004. Likewise, this Court finds that any such claim based on SUNY's contract to release Plaintiff for actions he committed prior to his resignation on December 3, 1999, accrued between January 16, 2000, and January 18, 2000, when SUNY participated in the case against Plaintiff at a hearing conducted by the Committee on Infractions. Put another way, all of the facts necessary to a cause of action sounding in tortious interference with this contract existed no later than January 2000, and Plaintiff could have sought relief at that juncture. *See Spinap Corp. Inc. v. Cafagno*, 302 A.D.2d 588, 588, 756 N.Y.S.2d 86 (2d Dep't 2003) (citing *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541, 620 N.Y.S.2d 318, 644 N.E.2d 1009 (1994)). His failure to file suit until March 19, 2004, renders his claim untimely.

This Court is not persuaded by Plaintiff's argument that his claim is timely based on a continuing violation theory. Under New York law, tortious interference with a contract is not a continuing tort for statute of limitations purposes. *Spinap Corp.*, 302 A.D.2d at 588, 756 N.Y.S.2d 86 (citing

Bloomfield Bldg. Wreckers, Inc. v. City of Troy, 41 N.Y.2d 1102, 1103, 396 N.Y.S.2d 359, 364 N.E.2d 1130 (1977)). As such, Plaintiff's claim, filed more than three years after the events which gave rise to it, is barred by the statute of limitations. Thus, Plaintiff's remaining state law claim for tortious interference with contractual relations will be dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is granted. Specifically, Plaintiff's federal claim is dismissed because Defendants are not state actors subject to liability under 42 U.S.C. § 1983. Further, Plaintiff's state law claim based on tortious interference with contractual relations is dismissed because it is barred by the applicable statute of limitations.

V. ORDERS

IT HEREBY IS ORDERED that Defendants' Motion to Dismiss (Docket No. 15) is GRANTED.

FURTHER, the Clerk of Court is directed to terminate Defendants'[1] erroneously identified Motion to Dismiss (Docket No. 14), as duplicative of the Memorandum of Law appearing at Docket Number 15.

FURTHER, that the Clerk of the Court shall take the steps necessary to close this case.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
Acting Clerk

Date:	
Docket Number:	05-5860-cv
Short Title:	Cohane v. National Collegiate Athletic Association
DC Docket Number:	04-cv-181
DC:	WDNY (BUFFALO)
DC Judge:	Honorable William Skretny

UNITED STATES COURT
OF APPEALS

FILED
MAR 29 2007
Thomas Asreen, Acting Clerk

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the day of March two thousand seven.

Timothy M. Cohane,

Plaintiff-Appellant,

v.

National Collegiate Athletic Association, by and through its President, Myles Brand; Tom Hosty, as an NCAA Enforcement Director and as an employee of the NCAA; Stephanie Hanna, as an NCAA Enforcement Director and as an employee of the NCAA; Jack Friedenthal, as an employee of the NCAA; and Former Chairman of the NCAA Committee on Infractions,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Appellee National Collegiate Athletic Association, Appellee Tom Hosty, Appellee Stephanie Hanna, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court
Thomas Asreen, Acting Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TIMOTHY M. COHANE,

Plaintiff,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; by and through its President, Myles Brand,

TOM HOSTY, as an NCAA Enforcement Director and an employee of the NCAA,

STEPHANIE HANNA, as an NCAA Enforcement Director and an employee of the NCAA,

JACK FRIEDENTRAL, as an employee of the NCAA, and former Chairman of the NCAA Committee on Infractions,

Defendants

Civ No.04-CV-0181 c/sr

COMPLAINT AND JURY DEMAND

[seal illegible]

MAR 19 2004

BY: /s/ D. Schmidt

1. Plaintiff, Timothy M. Cohane, by his attorneys, O'Leary & O'Leary, for his Complaint against the defendant above-named, alleges as follows:

JURISDICTION AND VENUE

2. This is a civil action brought for injunctive relief and for money damages to redress the injuries the defendants have caused to plaintiff by the deprivation under color of state law of the right to due process secured to plaintiff.

(a) The claims contained in this action arise under the provisions of the Fourteenth Amendment of the United States Constitution; and

(b) The Civil Rights Act of 1871, codified as 42 U.S.C. §§1983,

3. Jurisdiction over the federal claims is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343; supplemental jurisdiction over the related state laws claims is attained pursuant to 28 U.S.C. § 1367(1).

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2).

PARTIES

A. The Plaintiff

5. Plaintiff, Timothy M. Cohane, ("Cohane"), served as head coach of the men's intercollegiate NCAA Division I basketball team at The State University of New York at Buffalo ("SUNY Buffalo") from 1993 through December 3, 1999. During this time Mr. Cohane's employment was pursuant to written contract, he was a member of the faculty staff and terms of his employment were covered under a collective bargaining agreement existing between the State of New York and the Public Employees Union.

B. The Defendants

6. The defendant, National Collegiate Athletic Association ("NCAA") is an unincorporated association. Further, the NCAA markets, rules, governs, controls,

operates and licenses the multi billion dollar college sports industry and is sued herein by and through its president, Myles Brand ("Brand").

7. At all times mentioned herein, the defendant, NCAA is an unincorporated association which is involved in interstate Commerce including the transaction and engagement of business and commerce in the State of New York.

8. At all times herein mentioned, the defendant, NCAA by association, contract, agreement, and action through its agents, servants and or employees did and still does jointly engage in, control and operate all aspects of intercollegiate sports programs and athletic departments operating at a New York State funded institution known as State University of New York at Buffalo ("SUNY Buffalo") including the men's basketball team.

9. At all times relative to this complaint as alleged below in Count I, the defendant NCAA acted as an agent of the State of New York and by reason of the NCAA's willful participation and joint action actions as taken with state officials is sued herein in its capacity as a state actor, acting under color of state law.

10. Upon information and belief the defendants, Tom Hosty ("Hosty") and Stephanie Hanna ("Hanna") are employees of the NCAA and acted in a capacity as director of the NCAA enforcement staff.

11. Upon information and belief, defendant Jack Friedenthal ("Friedenthal") was an agent/servant and/or is an employee and member of the NCAA and acted in a capacity as Chairman of the Committee on Infractions on behalf of the NCAA.

12. At all times herein mentioned, the defendant NCAA had an agreement with the State of New York pursuant to which the NCAA which transacts business within the State

of New York and engages in business with the State of New York.

13. At all times hereinafter mentioned, defendant NCAA and SUNY Buffalo jointly engaged in the regulation and management of the men's basketball program at SUNY Buffalo; further SUNY Buffalo delegated significant controlling authority over its, basketball program to defendant NCAA.

14. Relief is sought against each and all defendants. The defendant NCAA is also sued herein by reason of tortious and wrongful actions committed in the State of New York by its agents servants and or employees.

15. This action is brought against the separate defendants, NCAA, HOSTY, HANNA and the NCAA both jointly and severally, and in their official and individual capacities.

16. The named defendants herein at all times relative to the complaint acted under the authority and laws of the State of New York. By reason of defendants' actions as set forth in Count I below, plaintiff has been deprived of rights protected by the United States Constitution and federal statutory law, as well as rights protected by common law. All references to "defendants" hereinafter shall mean all named defendants individually and in their official capacity.

BACKGROUND

17. Mr. Cohane was a student-athlete at the U.S. Naval Academy where he played varsity basketball. He graduated from the Naval Academy in 1967 and then was commissioned as an ensign in the Navy.

18. In 1968, Mr. Cohane volunteered for an assignment to command river boats during the Vietnam War. He fought in Vietnam during 1968 and 1969.

19. Plaintiff Cohane then returned home to the United States as a decorated war veteran. He received a Purple

Heart and two Bronze Star Medals from the President of the United States. Upon returning from war, Mr. Cohane was assigned to the United States Naval Base in Newport, Rhode Island. For two years he coached the basketball team at the base.

20. Mr. Cohane left the Navy in 1971 to accept a job at Iona Prep in New York. There, Mr. Cohane taught history and coached basketball for four years on the secondary school level.

21. In 1974, he began his career as a college basketball coach at Manhattanville College.

22. After five years at Manhattanville, Mr. Cohane left to accept the head men's basketball coaching position at Dartmouth College.

23. After coaching at Dartmouth for a period of four years, Mr. Cohane pursued a career on Wall Street. Mr. Cohane was successful in business, but missed coaching student athletes. Therefore, in 1988, he accepted a position as the unsalaried head coach at the United States Merchant Marine Academy.

24. From 1990-1991, Mr. Cohane worked as a voluntary assistant men's basketball coach at the United States Military Academy. After one season at West Point, Mr. Cohane left the Academy to take a similar position at Boston College, where he coached from 1991-1993.

FACTS

25. In 1993, SUNY Buffalo hired Mr. Cohane as its head men's basketball coach. During the first five seasons that Mr. Cohane coached, Nelson E. Townsend was the Director of Athletics at SUNY Buffalo. In the first five seasons under coach Cohane, the SUNY Buffalo men's basketball program progressed from an NCAA team without a league to the East Coast Conference, the Mid American

Conference and finally the MAC. In short, Coach Cohane's performance was extraordinary.

26. On January 29, 1999 SUNY Buffalo approved plaintiff's contract extension effective through April 13, 2002.

27. On August 9, 1999 Rob Fournier ("Fournier"), a Mid American Conference employee, authored and signed a letter addressed to the NCAA wherein Fournier confirmed a phone call he made to the NCAA on August 3, 1999 concerning an alleged infraction. Fournier in the August 9, 1999 letter referred to "documentation offered by the school". Further, the August 9, 1999 Fournier letter stated as follows:

> "As a consequence of the sensitive personal and private issues to be protected, the Conference will undertake this process in the coming weeks by submitting affidavits, interviewing affected parties, and insuring due process .... Toward that end, we will utilize when necessary the full services and cooperation of personnel at the University at Buffalo including New York State legal counsel."

28. Upon information and belief, on December 3, 1999, a meeting was held during which plaintiff was told by SUNY Buffalo counsel that the NCAA advised SUNY that it was assumed plaintiff was guilty of major NCAA rule violations and plaintiff and his staff should be forced to resign. On December 3, 1999, plaintiff was forced to resign.

29. On December 7, 1999, plaintiff receive a notification which that "Mid American Conference has adopted both conference procedures and in absence of specific stipulations those of NCAA Articles By-law 32".

30. On December 22, 1999 Fournier, representing the MAC and the NCAA, wrote to school officials that "although

characterized as a resignation (of Cohane) it has the effect of the change of leadership...and are all detailed as an institutional response to this investigation".

31. Between January 16, 2000 and January 18, 2000, the MAC Committee on Infractions held a hearing. Representatives of the MAC schools judged and reported on the MAC investigation and report of Fournier. Also present and participating presentation in the case against Cohane were SUNY Buffalo school officials and representatives of the NCAA.

32. At the hearing plaintiff's right to due process was violated by reason of the willful, arbitrary and capricious actions of the defendants.

33. At the hearing the plaintiff's rights to due process was violated by willful arbitrary and capricious actions including the suborning of perjury.

34. Between January 18, 2000 and October 14, 2001 the defendant NCAA arbitrarily and capriciously violated and disregarded their own rules, regulations, by-laws and procedures, including but not limited to Article 32 of NCAA By-laws as set forth and pertaining to:

> Conformance with procedures; Conflict of Interest; Status Notification, Public Announcements;
>
> Confidentiality; Representation by Legal Counsel; Proper Identification by Staff Member; Disclosure of Purpose of Interview; Basic Information Gathering; Timely Process; Recording of Interview Proceedings; Verification and Access to Records; Corroboration or Refutation of Information; Disclosure of Information; Notification of Others in Potential Jeopardy Obligation to Provide Full Information.

35. In the Spring of 2000, after the basketball season completed and after some student-athletes had exhausted their NCAA eligibility, the NCAA enforcement staff requested interviews with student-athletes regarding plaintiff. Student-athletes told State officials at SUNY Buffalo that they would not interview with the NCAA enforcement staff. In response, school officials under the control of the NCAA and aiding NCAA misled and improperly advised student-athletes that if they did not comply with the NCAA request for an interview the issuance of their degrees could be at risk.

36. On January 29, 2001 defendant employees Hosty and Hanna, issued a case summary to be used by the NCAA Committee of Infractions in a hearing to be held on February 9, 2001. In the preparation of the case study the defendant used and relied upon information provided by SUNY Buffalo officials including affidavits the defendants knew were coerced, false and otherwise tainted. Furthermore, in numerous instances Hosty and Hanna willfully and recklessly changed testimony in order to implicate plaintiff in alleged rules violations at SUNY Buffalo.

37. That on February 9, 2001, Cohane appeared before the NCAA for a so-called hearing. During the hearing, defendant NCAA and its employees defendants Hosty, Hanna and Friedenthal actively and jointly participated with SUNY Buffalo officials and MAC officials to violate and obstruct plaintiff's rights of due process. The defendants acting together with state university officials knowingly and carelessly permitted tainted and false sworn affidavits to be presented and used as evidence against Cohane.

38. That defendant NCAA and its employee Friedenthal, carrying a badge of authority bestowed by the State of University at Buffalo, publicly and voluntarily stated and declared in a written report/press/internet/

release titled "**University at Buffalo, The State University of New York Public Infractions Report**" dated March 21, 2001 that plaintiff acted "contrary to the principles of ethical conduct". The NCAA report further declared that plaintiff was "evasive, deceptive and not credible". In addition, sanctions were imposed to keep plaintiff from being able to coach in any NCAA school which includes schools in the New York State's Public University System.

39. In an unprecedented act of maliciousness, and in retaliation against Mr. Cohane's attempts to defend himself and establish his innocence, the NCAA in the March 21, 2001 report also found plaintiff guilty of major violations. In over 300 cases before and since involving the same by law before or since the NCAA uniformly ruled them to be minor violations.

40. In a further act of retaliation the NCAA charged Mr. Cohane with violating By-law 10.1, Ethical Conduct without cause.

41. On March 21, 2001 following the release of the NCAA report, a joint press conference was held before the media by the NCAA and SUNY Buffalo in which State University officials publicly declared that "UB accepts the report and its findings in its entirety". Plaintiff requested, but was denied, participation in the joint press conference.

42. That the untrue and false stigmatizing charges made by the defendants are for all time part of the plaintiff's personnel file maintained by the State University of New York at Buffalo and NCAA files including the NCAA website. The NCAA mandated that plaintiff was guilty of "violating principles of ethical conduct" and that plaintiff was "evasive, deceptive and not credible". This NCAA declaration and its ratification by SUNY Buffalo officials has been and continues to be disclosed by the defendants and State University officials to all prospective future

employers of plaintiff during plaintiff's attempts to seek future employment as a head coach in college basketball.

43. On August 20, 2001 the NCAA Appeals Committee reviewed the finding of the March 21, 2001 report.

44. On October 12, 2001 the NCAA Appeals Committee reprimanded the Committee on Infractions and stated that "many aspects of the case were troublesome". The Committee on Infractions was reprimanded for: not interviewing key witnesses; inconsistent investigation; using certain troublesome language involving the ethical conduct violation; the rationale for the ethical conduct finding. The Appeals Committee stated: "it is important to state clearly that a persons assertion of innocence however vigorous against charges of violations should not ordinarily be the subject of an unethical conduct finding".

45. The NCAA on October 12, 2001 admitted in writing that a finding of a violation of ethical conduct constitutes a "stain on the reputation and career" of the alleged violator.

46. Despite the NCAA admission that the ethical conduct charge was made in error and amounts to a scarlet letter, neither the NCAA or SUNY Buffalo took any action to remove this finding from the plaintiff's employment and/or NCAA record.

CLAIMS

Count I

47. Plaintiff incorporates by reference paragraphs "1" through "46" of this Complaint as if herein set forth at length.

48. That from August 1999 up to and including October 2001 the defendants, Hosty, Hanna and the NCAA acted under color of state law and were jointly engaged with State officials employed at SUNY Buffalo, including former athletic director Robert Arkeilpane, interim athletic director Bill Maher, Dennis Black, Vice president for

Student Affairs and former University President, William R. Greiner, all of whom willfully and jointly participated to and did engage in a wrongful pattern of wrongful conduct and actions which violated plaintiff's rights as guaranteed by the Fourteenth Amendment to the United States Constitution and in violation of plaintiff's civil rights as provided by 42 U.S.C. § 1983.

49. At all times herein, the NCAA sufficiently involved with SUNY Buffalo that NCAA conduct constituted state action. SUNY Buffalo: created the legal framework governing the conduct; delegated its state authority to the NCAA and knowingly accepted the benefits derived from the NCAA's unconstitutional behavior.

50. At all times the NCAA and SUNY Buffalo worked in close nexus to accomplish the wrongful actions complained of herein. The NCAA acted together with and obtained significant aid from State officials. The NCAA was a willful participant in state activity and worked in concert with SUNY Buffalo. The school officials authorized and the NCAA and were united against plaintiff.

51. That the defendants by their conduct, statements and actions, deprived plaintiff of the liberty interest of his reputation without due process law as provided in the Fourteenth Amendment of the United States Constitution and in violation of 42 U.S.C. § 1983.

52. The defendants through March 21, 2001 and continuing, voluntarily, publicly and falsely accuse plaintiff of misconduct and stigmatized him by declaring plaintiff guilty of "violating principles of ethical conduct" and other serious charges in the course of his employment at the SUNY Buffalo in violation of plaintiff's civil rights as guaranteed by the Fourteenth Amendments to the United States Constitution and in violation of plaintiff's civil rights as provided by 42 U.S.C. § 1983.

53. That the defendants herein by their wrongful conduct, statements, actions and omissions deprived the plaintiff of his property interest as a state employee without due process.

54. That the defendants by their wrongful conduct and statements struck to the very heart of plaintiff's professional competence and drastically impaired plaintiff's chance of ever receiving a head coaching position. The defendants have impugned plaintiff's reputation in such fashion as to effectively put a roadblock in the plaintiff's continued ability to practice his profession and deprived plaintiff of the freedom to continue employment in the coaching field.

55. That as a result of the actions of the defendants herein, plaintiff has suffered economic loss, damage to reputation and emotional distress.

56. That the actions of the defendants were undertaken wilfully, intentionally and maliciously, or with reckless disregard for the rights of the plaintiff thereby entitling plaintiff to punitive damages.

Count II

(Tortious interference with contractual relations against defendants MAC and Fournier)

57. Plaintiff incorporates by reference paragraphs 1 though 46 as set forth herein.

58. That a valid written contract of employment existed between the SUNY Buffalo and the plaintiff Cohane.

59. That said contract provided that Coach Cohane was deemed a state employee contracted to coach the Men's basketball team at SUNY Buffalo through April 13, 2002.

60. That the terms of the plaintiff's employment contract was covered by the collective bargaining agreement between the State of New York and the Public Employees Union.

61. The State University of New York adopted NCAA regulations and incorporated the regulations into the plaintiff's employment contract thereby creating a State adopted policy and guidelines which included NCAA regulations.

62. That upon information and belief, the defendant NCAA had actual knowledge of the written employment contract including terms and addendums thereto which existed between plaintiff and the State University of New York.

63. That by reason of the defendants actions as alleged in the complaint herein defendant procured a breach of plaintiff's employment contract to be caused by the State University of New York.

64. That December 3, 1999 plaintiff entered into a second written contract with SUNY Buffalo. The terms of the contract included a release for actions by the plaintiff which may have allegedly occurred on or prior to December 3, 1999.

65. That the defendant NCAA had actual knowledge of said contract dated December 3, 1999 including the terms and conditions thereof.

66. That the State University of New York on December 4, 1999 through March 21, 2001 and continuing has materially breached the December 3, 1999 contract by engaging in continuous pattern of wrongful, improper and egregious conduct and statements as alleged and which constituted a breach of the December 3, 1999 contract.

67. That the defendant NCAA jointly and severally by its conduct and actions as alleged in the Complaint herein procured and did cause the State of New York to breach the aforesaid December 3, 1999 contract between plaintiff and the State University of New York

68. As a result of defendant NCAA's actions, the State University of New York at Buffalo engaged in a continuous and wrongful pattern of conduct from December 4, 1999 through March 21, 2001 and continuing. During this time period the State University of New York, through its employees agents and officials, publicly claimed and alleged through false and misleading statements and documents that were submitted by the State University of New York at Buffalo that plaintiff had engaged in conduct that violated NCAA regulations by actions which occurred prior to December 3, 1999. This conduct constitutes a breach of the contract between SUNY Buffalo and the plaintiff.

69. That as a result of the defendant NCAA's tortious interference with the contractual relationship between plaintiff and the State University of New York at Buffalo, the plaintiff was caused to suffer economic damages, loss of income, and emotional distress.

RELIEF REQUESTED

WHEREFORE, plaintiff respectfully demands judgment against defendants:

(1) Declaring that plaintiff is entitled to name clearing hearing to seek removal of the false charges and a declaration that the defendants violated plaintiff's rights to due process;

(2) Granting plaintiff compensatory and punitive damages against defendants NCAA, arising from defendants aforesaid unlawful actions, as alleged in Count I, together with lawful pre-judgment interest thereon in the amount of $15,000,000.00;

(3) Awarding plaintiff compensatory and punitive damages and as against defendant NCAA, arising from their tortious actions as alleged in Count II in the amount of $10,000,000,00;

(4) Awarding plaintiff his reasonable attorneys fees pursuant to 42 U.S.C. § 1988;

(5) Awarding plaintiff the costs and disbursements of this action; and

(6) Awarding plaintiff such other and further relief as the Court seems just and proper.

JURY DEMAND

The plaintiff hereby demands, under Rule 38(b) of the Federal Rules of Civil Procedure, a trial by jury of all issues triable of right by a jury.

Dated: Garden City, NY
March 18, 2004

/s/ Sean O'Leary
Sean O'Leary (SOL-0040)
Attorney for Plaintiff
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